No. 13,146

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GEORGE NOROIAN AND ARCHIE NOROIAN, INDIVIDUALLY AND AS CO-PARTNERS D/B/A GEORGE NOROIAN COMPANY, RESPONDENTS

MEMORANDUM IN SUPPORT OF MOTION FOR ENTRY OF DECREE

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AUTHORITIES CITED

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The Board's motion for entry of decree is based upon the alternate grounds: (1) that there are no contestable issues before this Court, in view of respondents' failure to file exceptions to the Intermediate Report, and (2) that the findings upon which the order is based are fully supported by substantial evidence. In presenting the first ground, the Board is not unmindful of this Court's recent decision in *N. L. R. B.* v. *Red Spot Electric Company* (No. 12804 decided June 20, 1951) where District Judge Fee, speaking for the Court,[1] denied such a motion but granted a decree after a review of the record. In view of the fact that this Court, like every other

[1] Judge Pope concurred specially, stating a position which, as appears below, we respectfully submit is the correct one.

Court of Appeals in which such a motion has been made,[2] had previously granted such a motion in *N. L. R. B.* v. *Rico,* No. 12359, and had, as we thought, fully endorsed the principles underlying such procedure in the more recent case of *N. L. R. B.* v. *Townsend,* 185 F. 2d 378, certiorari denied, 341 U. S. 909, the Board in the *Red Spot* case did not file an extensive brief in support of its motion. We therefore respectfully request that this Court reconsider the views expressed in the *Red Spot* decision in the light of the considerations set forth in Point I below. Should this Court adhere to the *Red Spot* decision, however, we show in Point II that here, as in that case, examination of the record discloses substantial support for the findings of the Board.

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[2] See *N. L. R. B.* v. *Hill Transportation Co.*, (C. A. 1, No. 4395); *N. L. R. B.* v. *Dairy Center, Inc.*, (C. A. 1, No. 4476); *N. L. R. B.* v. *Israel Putnam Mills, Inc.*, (C. A. 2, January 10, 1950); *N. L. R. B.* v. *Vosburgh Company, Inc.*, (C. A. 2, January 8, 1951); *N. L. R. B.* v. *Truck Drivers Local Union No. 375, etc.* (C. A. 2, March 5, 1951); *N. L. R. B.* v. *Bergnes*, (C. A. 2, June 4, 1951); *N. L. R. B.* v. *Gunn*, (C. A. 3, No. 9822); *N. L. R. B.* v. *Star Metal Mfg. Co.*, (C. A. 3, No. 9981); *N. L. R. B.* v. *Cordele Manufacturing Co.*, 172 F. 2d 225 (C. A. 5); *N. L. R. B.* v. *Davis*, 172 F. 2d 225 (C. A. 5); *N. L. R. B.* v. *Amory Garment Company*, 24 LRRM 2274 (C. A. 5); *N. L. R. B.* v. *Woodruff*, (C. A. 5, No. 12850); *N. L. R. B.* v. *The American Thread Company*, (C. A. 5, No. 13586); *N. L. R. B.* v. *Lancaster Foundry Corporation*, (C. A. 6, No. 10847); *N. L. R. B.* v. *Ullin Box and Lumber Co.* (C. A. 7, No. 9588); *N. L. R. B.* v. *Hasselberg*, (C. A. 7, No. 10354); *N. L. R. B.* v. *Burk*, 177 F. 2d 1021 (C. A. 8); *N. L. R. B.* v. *Griffin-Goodner Grocery Co., Inc.*, 170 F. 2d 152 (C. A. 10); *N. L. R. B.* v. *International Union of Mine, Mill & Smelter Workers, etc.*, (C. A. 10, No. 4174).

I

In view of respondent's failure to file exceptions to the recommended order, there are no litigable issues for the Court to consider. The Court should, therefore, enter a decree enforcing the Board's order

Following the issuance of a complaint charging respondents with unfair labor practices, respondents were accorded the customary hearing before a Trial Examiner. The Examiner thereupon issued his "Intermediate Report and Recommended Order," dismissing certain allegations of the complaint but sustaining other allegations and recommending that respondents undertake certain remedial action. No exceptions were filed to the report and recommendations of the Trial Examiner. Accordingly, the Board, as required by the Act,[3] adopted the recommended order as its own.

We respectfully submit that just as the statute, when no exceptions have been filed to an Intermediate Report, requires the Board to enter the order based thereon without re-examining the record, so the statute contemplates that in such a case the Court shall enter a decree, treating the failure to file exceptions to the Intermediate Report as, in essence, a consent to the entry of the order by the Board, and reviewing the record only "for the purpose of determining that the

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[3] Section 10 (c) provides in part as follows: "* * * [the examiner] shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed."

Board had jurisdiction * * * and that it has not 'traveled outside the orbit of its authority' " (Pope, C. J., concurring in the *Red Spot* case, *supra.* This result follows, we believe, from a consideration of the role of exceptions in the administrative proceedings and from the express provisions of the statute itself.

1. *Summary statement of Board's position.*—Before developing in detail the reasons and authorities supporting the Board's view, it might be well briefly to summarize the Board's position and to discuss the objections thereto raised in the majority opinion in the *Red Spot* case. The Board's position rests primarily upon Section 10 (e) of the Act which provides that when the Board petitions for enforcement of an order, "no objection that has not been urged before the Board, its member, agent, or agency shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." In a case where no exceptions have been filed to the report and recommendations of the Trial Examiner, and his recommended order has automatically become the order of the Board we submit, and the cases cited in note 2, *supra,* hold, that Section 10 (e) contemplates judicial enforcement of the order. In the *Red Spot* case, however, the majority opinion suggests certain considerations which in the Court's view militated against this result. While these considerations will be more fully discussed *infra,* they may be summarized briefly as follows:

a. The Court suggests (*Red Spot* opinion, n. 3) that if "objections were made by [respondent] before the

trial examiner, an agent of the Board," Section 10 (e) does not preclude judicial consideration of the objection. But we respectfully submit that where the objection is not preserved in exceptions, it must be treated as abandoned, and entitled to no greater weight than if it had never been advanced at all (*infra,* pp. 9–12).

b. The Court's opinion in *Red Spot* further suggests that to grant the Board's motion and to enforce the order summarily involves a "mechanistic approach" which leaves the Court in the position of merely rubber-stamping the Board's order. The Court states that "if mechanical sanctions were required, these could have been provided without the necessity of appeal to the courts." The Board respectfully submits that this is not an accurate appraisal of the suggested procedure. It is true that in our view, as we argue more fully below, the absence of exceptions indicates the respondent's acquiescence in the propriety of the Board's findings and order in the form recommended by the trial examiner and constitutes an abandonment of objections thereto. But there remain at least three clear areas of judicial consideration in which the court may be called upon to act. These are: (1) questions of the Board's jurisdiction; (2) whether it is acting clearly outside the orbit of its authority; and (3) whether the respondent's failure to file exceptions is excused by "extraordinary circumstances" (Section 10 (e)).

As to the first, this Court held in *N. L. R. B.* v. *Townsend, supra,* as there suggested by the Board, that a respondent is never precluded from contesting

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before the Court the agency's ultimate finding that his activities affect commerce,[4] although his failure to file exceptions to the subordinate facts upon which the ultimate finding of commerce was based precluded an inquiry as to the propriety of such subordinate findings (185 F. 2d at page 381, n. 4).[5] As to the second, if, for example, the Board in its order purported to remedy violations of some other federal statute, or otherwise acted clearly outside the orbit of its authority under the National Labor Relations Act, the court could unquestionably decline to enforce the order.[6] The third area of judicial consideration in which reviewing courts may be called upon to act likewise needs little discussion. A finding of "extraordinary circumstances" which excuse the failure or neglect to file exceptions before the Board brings into play the full reviewing powers of the court.

For these reasons, because the powers of the reviewing court may be invoked in proper cases even though no exceptions have been filed, mechanical sanctions were not provided by Congress.

c. The opinion in the *Red Spot* case suggests that the reviewing court's powers and duties are analogous to the practice of trial courts, reflecting ancient

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[4] In the instant case the undisputed facts establish that respondents are engaged in interstate commerce within the jurisdiction of the Board. See Intermediate Report, p. 3.

[5] But cf. *Halsted* v. *Securities and Exchange Commission*, 182 F. 2d 660, 669 (C. A. D. C.), certiorari denied, 340 U. S. 834, where the court held that the failure to object to the Commission's jurisdiction constituted a waiver of the objection to jurisdiction.

[6] No such contention has been or could be advanced here as the Board's action is patently within the general scope of its authority.

chancery procedure, to take proofs before decree, and to the custom of appellate courts to notice obvious error. The Board respectfully submits that insofar as analogy may be drawn to equity practice, the rule applicable here is that which precludes appellate review of a Master's findings to which, prior to confirmation, no exceptions were filed. See *Kinsman* v. *Parkhurst,* 18 How. 289, 294–295; *Medsker* v. *Bonebrake,* 108 U. S. 66, 71; *Sheffield, etc. R. Co.* v. *Gordon,* 151 U. S. 285, 290; *Otis Elevator Co.* v. *Pacific Fin Corp.,* 68 F. 2d 664, 670 (C. A. 9). But quite apart from such rule, the chancery analogy is not apposite here because "judicial review of findings of trial courts does not have the statutory or constitutional limitations on judicial review of findings by administrative agencies" (*United States* v. *Gypsum Co.,* 333 U. S. 364, 395). Thus, the Supreme Court has observed that "except when the Constitution requires it, judicial review of administrative action may be granted or withheld as Congress chooses" (*Estep* v. *United States,* 327 U. S. 114, 120), and that "in awarding a review of an administrative proceeding, Congress has power to formulate the conditions under which resort to the Courts may be had" (*American Power Co.* v. *Securities and Exchange Commission,* 325 U. S. 385 389). To the same effect, see *Oklahoma* v. *Civil Service Commission,* 330 U. S. 127, 137. This principle is implicit in *N. L. R. B.* v. *Cheney California Lumber Co.,* 327 U. S. 385, 388, where the Supreme Court recognized Section 10 (e) of the National Labor Relations Act as a "limitation which Congress has placed upon the powers of the Courts

to review orders of the Labor Board," and was expressly recognized in a comparable situation in *Todd* v. *Securities and Exchange Commission,* 137 F. 2d 475, 478, where the Sixth Circuit stated:

> The Commission was established by congressional enactment, and the right to review its order likewise is given by the Congress. The conditions under which the right may be exercised are within the power of the Congress to define, and one condition is that any question relied on in this Court must have been urged before the Commission.

d. The majority opinion in *Red Spot* suggests that the amendments to the National Labor Relations Act and the Administrative Procedure Act have broadened the areas of judicial review of Board orders. As we discuss more fully (*infra,* pp. 15–23), we believe that those statutes broaden the scope of review when the courts are appropriately exercising reviewing powers, but do not grant power to review any action which prior to those statutes had not been subject to review at all.[7]

With this brief survey of the Board's position, and the points brought into issue by the *Red Spot* opinion, we turn to a somewhat fuller development of the reasons underlying the Board's view that in the absence of exceptions a decree should be entered enforcing the

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[7] The majority opinion in the *Red Spot* case in declining to follow *N. L. R. B.* v. *Cheney California Lumber Co.*, 327 U. S. 385, states that the opinion in that case is "subject to the change of the statutes." As Judge Pope observed in his concurring opinion, the *Cheney* opinion relies exclusively on the language of Section 10 (e) which was unaffected by the subsequent amendments to the Act.

order of the Board. As has been stated (*supra,* p. 4), the Board believes that this position finds support in general principles of law governing the role of exceptions in administrative procedure as well as in the governing statutory provisions, viewed in the light of their legislative history and controlling judicial interpretation.

2. *Role of exceptions in administrative process.*— The purpose and office of a statement of exceptions in an orderly scheme of administrative procedure are, of course, well recognized. In an administrative agency like the Board, where the facts are heard in the first instance by a trial examiner, a statement of exceptions serves to call to the attention of the Board itself the specific objections which a respondent may have to the decision of the trial examiner. This is obviously a logical procedure. Parties in the first instance may contend vigorously over issues, admissibility of evidence, etc., but, after the trial examiner's resolution of the conflict in an intermediate report, may conclude that only certain issues remain which are worthy of further contest. Or, the respondent may feel satisfied that the decision though unfavorable, is a proper one, particularly where, as here, respondent succeeded in securing the dismissal of a portion of the complaint. Consequently, where no exceptions are filed to an intermediate report, and there is no showing of extraordinary circumstances which excuse the failure to file exceptions, it is a rational inference that the party who will be adversely affected by the recommended order acquiesces therein. In these circumstances, it would serve no useful pur-

pose to require the Board or the Court to review the entire record. Indeed, such a requirement would be manifestly unreasonable and would serve only to consume the time and effort of both the Board and the Court to decide issues no longer in dispute. The same is true where a party decides to litigate further only certain adverse findings or conclusions, having no objections to the remainder of the intermediate report. Here, too, no useful purpose is served in requiring the Board or the Court to review issues no longer in dispute.

Moreover, since the failure to file exceptions is in substance an agreement that the court may "enter judgment on consent" (*N. L. R. B.* v. *Cheney California Lumber Co.,* 327 U. S. 385, 389), we submit that such failure should be given the same effect as a stipulation consenting to the entry of a decree. Such stipulations, "favored in law," have been accepted as relieving the Board of making findings of fact with respect to unfair labor practices (*N. L. R. B.* v. *J. L. Hudson Company,* 135 F. 2d 380, 384 (C. A. 6), certiorari denied, 320 U. S. 740) and as the basis for enforcement of Board orders without review of the matters stipulated. *Pittsburgh Plate Glass Co.* v. *N. L. R. B.,* 313 U. S. 146, 159; *N. L. R. B.* v. *Henry Levaur, Inc.,* 115 F. 2d 105, 106 (C. A. 1), certiorari denied, 312 U. S. 682; *N. L. R. B.* v. *Gerling Furniture Co.,* 103 F. 2d 663 (C. A. 7); *N. L. R. B.* v. *Pure Oil Co.,* 103 F. 2d 497 (C. A. 5); *N. L. R. B.* v. *Fickett Brown Mfg. Co.,* 140 F. 2d 883, 885 (C. A. 5).

The rule that issues as to which a respondent has failed to file exceptions may not thereafter be litigated

before a court is a corollary of the well-settled doctrine that a party proceeded against by an administrative agency must exhaust his administrative remedies before resorting to the courts. See *Yakus* v. *United States,* 321 U. S. 414, 446; *Falbo* v. *United States,* 320 U. S. 549, 553; *United States* v. *Ruzicka,* 329 U. S. 287, 292. The interrelationship of these doctrines is demonstrated in the legislative history of the Administrative Procedure Act. In enacting that statute, Congress expressly recognized that under the rule requiring exhaustion of administrative remedies, a party might not secure judicial relief if he failed to appeal from the trial examiner to the administrative agency. As the House Committee on the Judiciary said in explaining Section 10 of the Administrative Procedure Act (H. Rept. No. 1980, 79th Cong., 2d Sess., p. 55):

> It should be noted that Section 8 (a) permits agencies to provide by rule for appeals to them from initial decisions of examiners. That provision, as well as this provision of Section 10 (c), would authorize an agency to adopt rules requiring a party to take a timely appeal to the agency before resorting to the courts. *A party can not wilfully fail to exhaust his administrative remedies and then after the agency action has become operative, either secure a suspension of the agency action by a belated appeal to the agency, or resort to court without having given the agency an opportunity to determine the question raised.* If he so fails he is precluded from judicial review by the application of the time-honored

> doctrine of exhaustion of administrative remedies. [Emphasis supplied.][8]

3. *The statutory provisions and applicable decisions.*—For these reasons, when Congress amended the National Labor Relations Act, it implemented the provision of Section 10 (e) that "no objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances," with an additional provision in Section 10 (c) that unless a party adversely affected by an intermediate report files exceptions thereto within twenty days, the "recommended order shall become the order of the Board." Referring to this provision, the Court of Appeals for the Third Circuit in *N. L. R. B.* v. *Stocker Mfg. Co.,* 185 F. 2d 451, said at page 454:

> On its face, the statutory provision for an intermediate report appears to be designed primarily to avoid the necessity of independent examination of the record by the Board unless the party adversely affected by the examiner's recommendations shall file objection thereto.

In short Congress intended that the failure to file exceptions to the intermediate report be treated as

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[8] The Board's rule (Sec. 102.46, N. L. R. B. Rules and Regulations, Series 6, amended March 1, 1951) providing that "no matter not included in a statement of exceptions [to a trial examiner's report] may thereafter be urged before the Board or in any further proceedings," is not, we submit, a "self-serving proviso" (*Red Spot* opinion, n. 3), but is simply an application of the doctrine of exhaustion of remedies, which Congress contemplated in the Administrative Procedure Act.

an expression of acquiescence in the correctness and propriety of the recommended order.

We submit that under these provisions a complete review of the record by this Court is neither required nor contemplated by the statute, beyond the determination that the Board has jurisdiction and has not plainly travelled outside the orbit of its authority. This is the result reached by the Supreme Court in *Marshall Field & Co.* v. *N. L. R. B.,* 318 U. S. 253, 255–256, and in *N. L. R. B.* v. *Cheney California Lumber Co.,* 327 U. S. 385, 388. In both cases, the Court, relying specifically on Section 10 (e), held the Act precluded the courts from considering objections to a trial examiner's report when such objections had not been raised by specific exceptions filed with the Board. In the *Marshall Field* case, 318 U. S. at 255–256, the Court stated that a general exception to an intermediate report "did not apprise the Board that petitioner intended to press the question now presented" and that the "salutary policy adopted by Section 10 (e) of affording the Board opportunity to consider on the merits questions to be urged upon review of its order * * * makes * * * presentation [of such questions] to the Board a prerequisite to judicial review."

Again, in the *Cheney California* case, 327 U. S. at 388, the Court emphasized that Section 10 (e) explicitly limited the reviewing powers of the courts, stating:

> A limitation which Congress has placed upon the power of courts to review orders of the Labor Board is decisive of this case. Section

> 10 (e) of the Act commands that "no objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." We have heretofore had occasion to respect this explicit direction of Congress. *Marshall Field and Company* v. *N. L. R. B.*, 318 U. S. 253; and see *May Department Stores Co.* v. *N. L. R. B.*, 326 U. S. 376, n. 5. By this provision, Congress has said in effect that in a proceeding for enforcement of the Board's order *the court is to render judgment on consent as to all issues that were contestable before the Board but were in fact not contested.* Cf *Pope* v. *United States*, 323 U. S. 1. *Justification of such an order, which necessarily involves consideration of the facts which are the foundation of the orders, is not open for review by a court,* if no prior objection has been urged before the case gets into court and there is a total want of extraordinary circumstances to excuse failure or neglect to urge such objection. [Emphasis added.] [9]

The "explicit direction of Congress" has been followed by this Court and the Courts of Appeals of other Circuits. *N. L. R. B.* v. *Townsend, supra; N. L. R. B.* v. *Kinner Motors, Inc.*, 154 F. 2d 1007 (C. A. 9); *N. L. R. B.* v. *Van De Kamp's Holland-*

[9] The opinion in the *Red Spot* case, *supra*, infers in footnote 6 that the effect of the foregoing portion of the opinion in the *Cheney California* case has been changed by statute. As we show below (pp. 15–23), neither the Administrative Procedure Act, nor the Labor Management Relations Act, 1947, effected any change in this regard other than, as we think, to strengthen the inference of acquiescence flowing from failure to file exceptions.

Dutch Bakeries, Inc., 154 F. 2d 828 (C. A. 9); *N. L. R. B.* v. *Draper Corporation*, 159 F. 2d 294, 298 (C. A. 1); *N. L. R. B.* v. *Winter*, 154 F. 2d 719, 722, n. 7 (C. A. 10).

The *Marshall Field* and *Cheney* cases establish that where specific objection is not pressed before the Board, it may not thereafter be urged in court as grounds for setting aside or modifying the Board's order. Since the rule as stated by the Supreme Court is rooted in "the salutary policy * * * of affording the Board opportunity to consider on the merits questions to be urged upon review of its order," the result, we submit, must be the same where an objection, though raised, is later abandoned before the Board as where it was never raised before the Trial Examiner in the first place. And this result, already implicit in the general rule governing the failure to take exceptions, is now reinforced by the amendment to Section 10 (c) which specifically precludes the Board from examining into a record in the absence of exceptions and requires it to issue as its order the order recommended by the Trial Examiner.

The legislative history of the amendment of Section 10 (c) supports this position.[10] The amendment was objected to by the opponents of the amendatory

[10] Footnote 8 of the opinion in the *Red Spot* case states that in view of the passage of the Administrative Procedure Act, especially Section 10 (e), the legislative history of Section 10 (c) of the National Labor Relations Act, as amended, cannot be fitted into the construction urged by the Board. We discuss the impact of the Administrative Procedure Act below (pp. 19–22).

legislation, on the ground that (Report No. 245 on H. R. 3020, 80th Cong., 1st Sess., p. 93):

> It in effect suspends the doctrine of exhaustion of administrative remedies and permits a dissatisfied litigant to sidestep the agency by direct resort to the courts. The agency may be first called upon to defend a decision it has not made, or be reversed as to the rulings which, if error therein had been called to its attention by appropriate appeal, it might have itself corrected. Moreover, the status of trial examiners' reports is already covered by the Administrative Procedure Act of 1946 [Section 8 and 10 (c)] and there is no need at this time for further legislation on the subject.

Senator Taft answered this contention in an analysis which he inserted in the Congressional Record as follows (93 Cong. Rc. 6860):

> Section 10 (c): In an effort to lessen the work load of the Board and facilitate its disposition of cases this subsection was amended to give finality to recommended orders of trial examiners without Board review if no exceptions were taken within 20 days. It has been stated that this permits an unsuccessful litigant to stand idly by while an erroneous report of a trial examiner becomes the order of the Board and then embarrass the Board when the case goes into the courts for enforcement. Several checks would prevent this happening. Section 10 (e) provides, "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the

> court.'' [11] In addition, the attorney trying the case would presumably file exceptions to such a report and the General Counsel in any event would not go forward with enforcement if the order was erroneous.

Senator Taft thus correlated the amendment with Section 10 (e) under which courts had refused to review any issue as to which an exception had not been filed by a respondent.

The 1947 amendments to the National Labor Relations Act are significant also in other respects. Thus, as we have seen, Congress amended Section 10 (c) to provide that if no exceptions are filed to the Intermediate Report, "such recommended order shall become the order of the Board and become effective as therein prescribed." Unless the phrase "and become effective" is pure surplusage, it would seem that Congress contemplated a judicial decree would follow upon a Board order which was entered in accordance with the requirements of Section 10 (c). Congress was well aware that Board orders are not self-enforcing, but required judicial approval before they become "effective." Consequently in providing in Section 10 (c) that a trial examiner's order shall not only "become the order of the Board" but shall "become effective as therein prescribed," Congress apparently anticipated that a judicial sanction would follow upon the issuance of such an order of the Board.

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[11] The reference to Section 10 (c) is obviously a typographical eror in the Congressional Record. The proviso referred to appears in Section 10 (e).

In addition, Congress reenacted Section 10 (e) without change, thereby indicating approval of the principle of preclusion of judicial review as enunciated in the *Cheney California, Marshall Field,* and other cases above cited (*supra,* pp. 13–15). See *N. L. R. B.* v. *Gullett Gin Co.,* 340 U. S. 361, 365–366; *Johnson* v. *Manhattan Ry. Co.,* 289 U. S. 479, 500; *Heald* v. *District of Columbia,* 254 U. S. 20, 23. Indeed, with due deference to the suggestion in the *Red Spot* opinion that the amendments to the Act broadened the area of judicial review, we respectfully submit that since Congress reenacted Section 10 (e), continuing the previous restraint on review by the courts, and amended Section 10 (c) to impose new limitations on review by the Board, the amended Act restricted the *areas* of review, at the same time that, as shown below, it expanded the *scope* of review within the area as thus restricted. Certainly Congress in depriving the Board of reviewing power over this class of case did not intend to burden the courts with the initial review of a record which Congress closed to review by the Board.

Significant, also, is the recent action of the Supreme Court in *N. L. R. B.* v. *Mexia Textile Mills,* 339 U. S. 563, and in *N. L. R. B.* v. *Pool Mfg. Co.,* 339 U. S. 577. In these cases the Board had adopted the recommended orders of Trial Examiners when the respondents failed to file exceptions thereto, and moved the Court of Appeals for the Fifth Circuit for summary entry of decrees. Upon motions of the respective respondents, the Court remanded the cases to the Board to take additional evidence as to whether and

to what extent its orders had been complied with and whether the cases were moot. 24 L. R. R. M. 2147; 25 L. R. R. M. 2295. The Supreme Court vacated the orders of the Court of Appeals and remanded the cases with direction that "enforcement of the Board's order [be] decreed pursuant to Section 10 (e), unless 'extraordinary circumstances' are pleaded which justify the respondent's failure to urge its objections before the Board" (339 U. S. at pp. 570, 582). It is to be noted that the Supreme Court interpreted the failure to file exceptions as a "failure to urge * * * objections before the Board," even though, as in the *Pool* case, the respondent had contested the case before the trial examiner. Thus, the Supreme Court observed in its opinion (336 U. S. at p. 579, n. 2) that the trial examiner had rejected respondent's allegation that the union no longer represented the majority in the bargaining unit—a contention which it reasserted in the Court of Appeals. Compare footnote 3 of the *Red Spot* opinion.

4. *The Administrative Procedure Act.*—The Court in the *Red Spot* opinion suggested (n. 8) that "in view of the * * * declared intent in [the Administrative Procedure Act] to give final powers of interpretation to the courts," the Board's contention must be rejected. But the Administrative Procedure Act does not grant judicial review over agency action in areas where such review is denied or limited by the National Labor Relations Act. Congress in the Administrative Procedure Act expressly made the judicial review provisions of Section 10 (5 U. S. C. 1009 (e)) subject to statutes which limit the right and scope of review

in specific instances. Thus the provisions of Section 10 are prefaced by the following limitation:

> Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion

Emphasizing the foregoing "excepting" clause, this Court in *Willapoint Oysters* v. *Ewing,* 174 F. 2d 676, certiorari denied, 338 U. S. 860, held that "the review provisions [of the Administrative Procedure Act and of the substantive statute involved] are in pari materia; both relate to the same matter or subject, and it is our view that they dovetail and should be considered together and given effect" (174 F. 2d at page 686). The authorities are in universal accord: *Ludecke* v. *Watkins,* 335 U. S. 160, 163; *Kirkland* v. *Atlantic Coast Line Railroad Company,* 167 F. 2d 529 (C. A. D. C.), certiorari denied, 335 U. S. 843; *Ohio Power Company* v. *N. L. R. B.,* 164 F. 2d 275 (C. A. 6); *Olin Industries* v. *N. L. R. B.,* 72 F. supp. 225, 228 (D. Mass.); *Brisbois* v. *Hague,* 85 F. Supp. 13, 14 (D. Mass.); *McEachern* v. *United States,* 84 F. Supp. 902, 904–905 (W. D. S. Car.); *The Great Lakes Steel Corporation* v. *United States,* 81 F. Supp. 450, 455 (E. D. Mich.); Davis, *Scope of Review of Federal Administrative Action,* 50 Columbia L. R. 559, 561 (1950).

As stated in the Attorney General's Manual on the Administrative Procedure Act (Federal Prison Industries, Inc., Press, 1947, pp. 94–95):

> Section 10 applies "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discre-

> tion." The intended result of the introductory clause of section 10 is to restate the existing law as to the area of reviewable agency action. House Hearings (1945) p. 38 (Sen. Doc. p. 84).
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> In addition, the introductory clause of section 10 provides a most important principle of construction for reconciling the provisions of the section with other statutory provisions relating to judicial review. All of the provisions of section 10 are qualified by the introductory clause, "*except so far as* (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion." [Emphasis supplied.] The emphasized phrase does not mean that every provision of section 10 is applicable except *where* statutes preclude judicial review altogether. Instead, it reads "*Except so far as* (1) statutes preclude judicial review," with the clear result that some other statute, while not precluding review altogether, will have the effect of preventing the application of some of the provisions of section 10. The net effect, clearly intended by the Congress, is to provide for a dovetailing of the general provisions of the Administrative Procedure Act with the particular statutory provisions which the Congress has moulded for special situations.[12]

In applying Section 10 of the Administrative Procedure Act, the Court of Appeals for the District of Columbia in *Kirkland* v. *Atlantic Coast Line Railroad Company, supra,* held that where a statute, such as the

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[12] The foregoing interpretation of Section 10 by the Attorney General was cited with approval by this Court in *Willapoint Oysters* v. *Ewing*, *supra*, at p. 686.

Railway Labor Act, as construed by the Supreme Court in *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, 305, did not provide judicial review of agency action, Section 10 of the Administrative Procedure Act "leaves the situation unchanged" (167 F. 2d at pages 529–530). The legislative history of that Act, the Court held, indicates "that when statutes 'withhold' judicial review they 'preclude' it" (*ibid*). Since, as the Supreme Court held in the *Marshall Field* and *Cheney* cases, Section 10 (e) of the National Labor Relations Act precludes judicial review in the absence of exceptions filed with the Board, it follows that the Administrative Procedure Act, which did not create any new area of judicial review, has not altered the former rule.

5. *The impact of the Pittsburgh Steamship and Universal Camera decisions.*—The opinion in the *Red Spot* case adverts to the recent decisions in *Universal Camera Corp.* v. *N. L. R. B.,* 340 U. S. 474, and *N. L. R. B.* v. *Pittsburgh Steamship Co.,* 340 U. S. 498. The Board respectfully submits, however, that as pointed out by Circuit Judge Pope in his concurring opinion, these cases do not modify the rule in *Cheney California,* which is applicable here. In *Universal Camera* and in *Pittsburgh Steamship,* the Court was dealing with cases in which exceptions had been filed, and the issue before the Court was the proper interpretation of the substantial evidence rule as affecting the scope of judicial review of questions of fact in cases properly before the Court. The limiting provision of Section 10 (e) was neither involved nor referred to by the Court, nor did the Court allude to

the *Cheney California* decision or to its more recent decisions in *Pool* and *Mexia, supra.* In these circumstances we believe the *Universal* and *Pittsburgh* cases stand only for the proposition that where exceptions have been filed and the Court has reviewing powers, it should exercise a greater scope of review, and not as granting power to review agency action as to which power to review does not exist.

* * * * *

For the foregoing reasons the Board respectfully requests that this Court reconsider the views expressed in the majority opinion in the *Red Spot* case, and enter a decree enforcing the order of the Board without reviewing the entire record.

II

In any event, the Board's findings that respondents engaged in unfair labor practices in violation of Section 8 (a) (1) and (3) of the Act are fully supported by the evidence

Assuming that this Court feels constrained to review the record before enforcing the order of the Board, the Board submits that such an examination will disclose that the Board's findings are amply supported by substantial evidence. Indeed the fact that respondents, although represented at all stages by counsel, found no occasion to except to any of the findings or conclusions, in itself suggests that the Trial Examiner's report is supported by the record. Furthermore, the fact that the Trial Examiner dismissed the complaint as to seven of the fifteen alleged discriminatees bespeaks his careful appraisal of the evidence before him. To assist the Court in such

review as it deems necessary, the Board presents the following statement of the Trial Examiner's findings together with a brief statement of the supporting evidence.[13]

A. The business of the respondents

The respondents, George Noroian and Archie Noroian, are brother and sister and, as copartners under the name of George Noroian Company, own and operate a fruit processing, packing, and canning plant in or near Dinuba, California (I. R. 3; T. 6–7). The establishment is located on a 65-acre farm which the respondents also own. The operations conducted in the plant consist, in the main, of the canning and packing of peaches, apricots, plums, nectarines, grapes, and figs, and the manufacture of candied fruits (I. R. 3; T. 7). Approximately 30 percent of the fruit packed or processed in the plant is grown on the respondents' farm; the balance of the plant's output is purchased from other growers (I. R. 3; T. 305–306). All of the employees concerned in the present proceeding were employed in the plant during the period in question and were engaged in occupations relating to the packing, canning, or other processing of fruits (I. R. 3; T. 254, 305, respondents' exhibit no. R. 5). The Trial Examiner found that

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[13] In the ensuing statement, references to the findings in the Intermediate Report of the Trial Examiner are designated as I. R. —; references to supporting evidence in the stenographic transcript of the record are designated as T.—.

such employees were not employed as agricultural laborers within the meaning of the Act (I. R. 3).[14]

In the regular course and conduct of their business, respondents annually produce canned and candied fruits at a value in excess of $150,000 per year. Between 40 and 50 percent of such products are sold to customers located in States other than California and are shipped in interstate commerce by respondents to points outside California (I. R. 3; T. 14). The Trial Examiner found that at all times material to the issues in this proceeding respondents were engaged in interstate commerce within the meaning of the Act (I. R. 3).

B. The unfair labor practices

1. Prefatory statement

On August 14, 1949, Cannery Food Processors, Cotton Warehousemen and Helpers, Local Union No. 97, herein referred to as the Union, began to solicit signatures among the employees to a document purporting to petition the Board for "a certified election." Boyce Partain, an employee, circulated the petition near the plant as employees entered or left the establishment. Partain, after securing a substan-

[14] Although respondents in their answer had alleged that the employees were agricultural laborers, they appear to have abandoned this position inasmuch as they did not urge it as a ground for dismissal nor did they advert to it in their brief filed with the Trial Examiner. In any event, each of the employees involved testified without contradiction that they were employed in the canning and processing plant and the Trial Examiner found that the allegation that the employees were agricultural workers was without merit (I. R. 3).

tial number of signatures, turned the document over to William Fowler, the Union's business agent, on August 20 (I. R. 5; T. 16). All seven employees who were discriminatorily discharged[15] had signed the petition.

2. Employees Elsie Hunt and Virginia Dodson

Employees Hunt and Dodson were employed on the day shift (I. R. 7; T. 57), and were discharged on August 19, about an hour before the day shift ended (I. R. 8; T. 57–58), after they had been interrogated by a floor lady and by Archie Noroian as to whether they were connected with the Union and had signed "the union paper" (I. R. 7, 8; T. 54, 59). While they were in the office waiting for their checks, Archie Noroian expressed the view, in substance, that neither the plant nor the employees were suitable subjects for unionization and concluded with the statement that Hunt and Dodson, as well as the others who had signed the petition, would be blacklisted for employment with other packing plants in the area (I. R. 8; T. 59).[16]

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[15] These were employees Hunt and Dodson (I. R. 7; T. 52, 60); Moser and Davis (I. R. 12; T. 122–123, General Counsel's Exhibit No. 3); Stegall (I. R. 14; T. 137); Suggs (I. R. 18; T. 165–166); Holmes (I. R. 21; T. 147–148).

[16] Archie Noroian denied only that she had ever made inquiry of any of the plant's employees concerning their union activities or that she threatened to have those who signed the petition blacklisted (I. R. 8; T. 339–342). She also testified that she did not learn of the existence of the representation petition until the morning of August 20 (I. R. 8; T. 347). The trial examiner found that, except when Hunt was hired and discharged, she had no other contact with Archie Noroian. Yet some of the remarks she attributed to Archie concerning the adaptability of the plant and its employees to unionization were significantly reminiscent of similar statements made by George Noroian on the witness

The trial examiner rejected respondents' defense that employees Hunt and Dodson were laid off as part of a general layoff at the close of the peach season and that efficiency factors were used to determine which employees should be laid off.[17] He pointed out that respondents offered no evidence bearing upon the quantity or quality of Hunt's and Dodson's production, and that the employees who were laid off were permitted to complete their shift, while Hunt and Dodson were discharged before the end of the shift and were paid off immediately (I. R. 9; T. 270, 59).

The trial examiner concluded that the interrogation of Hunt and Dodson and the threat to blacklist them violated Section 8 (a) (1) of the Act and that the discharge of Hunt and Dodson contravened both that section and Section 8 (a) (3) (I. R. 10).

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stand after Hunt had testified (I. R. 10; Cf. T. 57 and T. 287–288, 298). This, the trial examiner observed, lent a note of authenticity to Hunt's version of her conversation with Archie Noroian when she was discharged (I. R. 10).

[17] Respondents' plant operations are seasonal in character and are controlled, in a substantial degree, by the harvest periods for the respective types of fruit and the flow of the products to and through the plant. The unfair labor practices occurred during the week of August 19, 1949, during the climax of the peach-canning season. During that week, the plant operated on a day and night shift basis. As respondents were uncertain of the exact period and scope of the nectarine harvest which was immediately anticipated, they laid off the night shift employees, but instructed them to keep in touch with the plant in order to be advised when a night shift would be necessary (I. R. 4–5; T. 270–271). None of the 7 employees here in question were involved in the layoff.

3. Employees Robert Ray Moser and W. O. Davis

Employees Moser and Davis were employed on the day shift in labeling cans (I. R. 11–12; T. 121), and were abruptly discharged on Saturday, August 20, before the end of the day shift (I. R. 12; T. 124–125), after Ouzounian, their supervisor,[18] had interrogated them concerning the signing of the petition and had learned that they had signed (I. R. 12; T. 124–125). Since it is undisputed that Moser and Davis worked on August 20, the Trial Examiner held that the termination of their employment could not be considered as part of the general lay-off that occurred on August 19 (I. R. 13). Ouzounian gave no testimony as to any circumstances surrounding the termination of Moser's and Davis' employment, and the Trial Examiner did not credit his bare denial of the interrogation (I. R. 12).

The Trial Examiner therefore found that Ouzounian's interrogation of employees Moser and Davis concerning their signing the petition violated Section 8 (a) (1), and that Ouzounian, in violation of Section 8 (a) (1) and (3), discharged both employees because they had signed that document (I. R. 13).

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[18] Ouzounian (also referred to in the record as Chuck) was the supervisor in charge of the plant's receiving department (I. R. 4). Among other duties, he supervised the employees who received the raw fruit as it arrived at the plant and thereafter distributed the product throughout the plant (I. R. 4; T. 308). He had, on several occasions, hired employees but had not discharged any (I. R. 4; T. 309).

1. Employee Lee Stegall

Lee Stegall was employed on the day shift in stacking and trucking cans (I. R. 14; T. 136, 146). After working all day on Saturday, August 20, he was instructed by Ouzounian to work that night (I. R. 14; T. 145). That evening, before he returned to work on the night shift, and while he was standing with several other persons at a soft-drink machine in the plant, George Noroian approached the group and, referring to the employees who had been laid off and were marching up and down the road in front of the plant, told the people at the machine "Not to pay any attention to that union bunch out there, if we wanted to keep our jobs" (I. R. 15; T. 138). Noroian also said that other canneries had had to close because they could not pay the wages desired by the union (*ibid.*)[19] About 15 minutes later, as Stegall was returning to work, he encountered Archie Noroian who admittedly discharged him (I. R. 16; T. 139, 340). When Ouzounian learned from Stegall that the latter had been discharged, he asked him the

[19] Noroian's denial of the foregoing statement was not credited by the trial examiner who stated that Noroian did not impress him as a factual and objective witness (I. R. 15). The trial examiner pointed out that at various points Noroian gave exaggerated emphasis to incidents, some wholly ungermane (see, e. g. T. 296–297, 256–261) and colored his evidence with statements and conclusions which were not compatible with the facts (I. R. 15). Thus, for example, in an effort to underline the contention that the plant employees constituted "agricultural labor," he stated that the plant "primarily" processes and packs fruits "that we grow ourselves" (I. R. 15; T. 246). Later, when asked to give specific figures, he testified that approximately 70 percent of the plant's output is grown on farms belonging to others (I. R. 15; T. 305–306).

reason for the dismissal. Stegall replied, "Well, I guess like the rest of them, because of signing that paper" (I. R. 16; T. 140). Ouzounian responded, "You guys ought to know better than that" (*ibid.*).

Archie Noroian testified that she discharged Stegall because he had "Started working when he wasn't supposed to be working" and that she told him "You were not supposed to go back to work until you were told to go to work" (I. R. 16; T. 340). The trial examiner rejected this explanation, observing that Ouzounian did not deny that Stegall had worked all day on Saturday and that he had requested Stegall to continue working on Saturday night (I. R. 17). The trial examiner concluded that "It seems incredible that Ouzounian would permit Stegall to work contrary to a policy established by the Noroians" (I. R. 18).

The trial examiner concluded that George Noroian's and Ouzounian's remarks constituted restraint and coercion in violation of Section 8 (a) (1) of the Act and that Stegall's discharge violated Section 8 (a) (3) and (8) (a) (1) of the Act (I. R. 15, 18).

5. Employee Suggs

Walter A. Suggs was also employed on the day shift, doing janitorial work (I. R. 18; T. 163–164, 174). At the end of the day on Friday, August 19, Ouzounian told him to return to work on Monday (I. R. 18; T. 168). He returned to the plant on Saturday with his wife to get her last pay check. She had previously been employed in the plant and

had been laid off on Friday (I. R. 18; T. 169, 177, 179). There he encountered Archie Noroian who told him to get his check for his earnings for the last week of work[20] (I. R. 18; T. 167–170). Because the bookkeeper had some difficulty in computing the pay, Suggs called Ouzounian to the office to guide the bookkeeper in making the computation. In so doing he told Ouzounian that he would not return on Monday. Ouzounian replied, "Well, you boys have made it hard on yourselves." (I. R. 18; T. 17.)[21]

The trial examiner pointed out that while George Noroian testified to instructions for a general layoff at the close of the night shift on August 19, there was no evidence that Suggs was laid off on that day and it was peculiar that Archie Noroian, and not Ouzounian, who was Suggs' supervisor, notified Suggs of his discharge. The latter circumstance is incompatible with George Noroian's testimony that he had supervision over the male supervisors and male employees and that his sister, Archie, had supervision over the females (I. R. 17; T. 272–273).

The trial examiner concluded that in view of Ouzounian's position, his remark that "You boys made it hard on yourselves" had the plain implica-

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[20] The plant's regular payday is on Friday of each week. The respondents follow the practice of withholding an employee's pay for one week and of paying him in the week following the one in which the work was performed (I. R. 5; T. 167–168).

[21] For reasons fully spelled out in the intermediate report (I. R. 11, 12, 13, 17, 19), the trial examiner did not credit Ouzounian's denial of Suggs' testimony, nor did he credit George Noroian's testimony that Suggs was incompetent and that he had instructed Archie Noroian to discharge him (I. R. 19).

tion that discharge was the penalty for concerted activity, and such statement therefore contravened Section 8 (a) (1) of the Act. The trial examiner also found that Suggs was discharged because respondents believed he had engaged in union activity, and that the dismissal violated Section 8 (a) (1) and 8 (a) (3) of the Act.

6. Employee Ellen Holmes

Ellen Holmes was also employed on the day shift (I. R. 21; T. 148). At the end of her shift on August 19, Holmes was among a group of employees standing outside the plant office waiting for their pay. Archie Noroian came up to the group and stated that "Everyone who was for the union or wanted union" was "to get out" and that such persons were "fired" (I. R. 21; T. 149). Holmes interpreted Archie Noroian's statement that she was being discharged. When she got her check, she left (I. R. 21; T. 150).[22] From his observation of Holmes' demeanor and from the quality of her testimony, the trial examiner credited her testimony and found that although Archie Noroian's statements were not directed specifically at Holmes, the latter was warranted in construing the remarks as applicable to her and as affecting her discharge (I. R. 22). He concluded that Archie Noroian's remarks were in violation of

[22] Archie Noroian testified that she did not remember Employee Holmes and denied making the statement attributed to her. For reasons fully discussed in the Intermediate Report, the trial examiner did not credit Archie Noroian's denial (I. R. 22).

Section 8 (a) (1) and that Holmes' discharge was in violation of Section 8 (a) (1) and (3) of the Act.

We submit that the foregoing statement demonstrates that the trial examiner's findings are amply supported by substantial evidence. The Board's order [23] should therefore be enforced.

Respectfully submitted.

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NOVEMBER 1951.

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[23] The Board's order requires the respondents to cease and desist from the unfair labor practices found and directs them to offer the discharged employees reinstatement and to make them whole for any loss of pay they may have suffered by reason of respondents' discrimination against them. In this regard, the Board's order takes account of the fact that respondents' operations are of a seasonal character and depend substantially upon the respective periods of harvest of the types of fruits processed in the plant. The Board's order also requires respondents to post notices.

APPENDIX

1. The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause

notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

2. The relevant provisions of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C. Supp. I, 141 *et seq.*) are as follows:

* * * * *

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * * *

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

"(3) by discrimination in regard to hire or tenure of employment or any term or con-

dition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

"SEC. 10. * * *

* * * * *

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * * * *

"(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person

resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

* * * * *

3. The relevant provisions of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001, *et seq.*) are as follows:

* * * * *

SEC. 7 * * *

(c) *Evidence.*—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except

upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. * * *

* * * * *

SEC. 10. Judicial review of agency action except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

* * * * *

(e) *Scope of review.*—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

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